Supreme Court, U.S.
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No.

In the Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER,

v.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, RESPONDENT

BRIAN KAPSNER AND RYANN KAPSNER,
REAL PARTIES IN INTEREST.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LEO BERRY
OLIVER H. GOE
CHAD E. ADAMS
Browning, Kaleczyc, Berry & Hoven, P.C.
139 North Last Chance Gulch
P.O. Box 1697
Helena, MT 59624
(406) 443-6820

JOHN C. BERGHOFF, JR.
MICHELE ODORIZZI
Counsel of Record
MICHAEL P. RISSMAN
Mayer, Brown, Rowe & Maw LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Petitioner The Burlington Northern and Santa Fe Railway Company

QUESTION PRESENTED

Although Rule 34 of the Federal Rules of Civil Procedure does not require more, the Ninth Circuit concluded that a general objection to producing documents protected by the attorney-client privilege or work product doctrine is insufficient to preserve the privilege. Citing Rule 26(b)(5), the court concluded that the privilege is waived, notwithstanding the assertion of an objection in a Rule 34 response, if a privilege log identifying the documents withheld from production is not submitted within a "reasonable" time after Rule 34 responses are due. Retroactively applying this new "holistic reasonableness" analysis to the facts before it, the court concluded that BNSF had provided a privilege log too late and therefore declined to disturb the magistrate's ruling that BNSF had waived all of its privileges with respect to over 1,000 documents identified on that log.

Two questions are presented by the Ninth Circuit's decision:

1. Do the Federal Rules require a litigant to supply a privilege log in accordance with Rule 26(b)(5) when it responds to a Rule 34 request or is it sufficient to object to producing privileged materials in a Rule 34 response, subject to the later production of a log identifying the documents that are being withheld?

2. Can a court declare privileges waived simply because it concludes, in hindsight, that there was an unreasonable delay in providing a privilege log — without any finding of bad faith on the part of the responding party or prejudice to the opposing party?

PARTIES TO THE PROCEEDINGS

Petitioner is the BNSF Railway Company, formerly known as the Burlington Northern and Santa Fe Railway Company ("BNSF"), which is the defendant in the action out of which this proceeding arose. Because this is a mandamus proceeding, the respondent is the United States District Court for the District of Montana. Brian Kapsner and Ryann Kapsner are the plaintiffs in the action and the real parties in interest.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner BNSF is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which is a publicly held company. No other publicly held company owns 10 percent or more of petitioner's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RULES INVOLVED 1

STATEMENT 2

A. Proceedings in the Trial Court 5

B. The Ninth Circuit's Opinion 8

REASONS FOR GRANTING THE PETITION 10

I. THE NINTH CIRCUIT'S DECISION EFFECTIVELY REWRITES THE FEDERAL RULES 10

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE APPROACH TAKEN BY THE D.C. CIRCUIT AND THE WEIGHT OF AUTHORITY IN THE DISTRICT COURTS 13

TABLE OF CONTENTS — Continued

Page

III. THE NINTH CIRCUIT'S NEW RULE UPENDS DECADES OF ESTABLISHED DISCOVERY PRACTICE AND OPENS A PANDORA'S BOX OF CONFUSION LEADING TO DELAY AND INADVERTENT PRIVILEGE WAIVER 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: **Page**

American Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y, 406 F.3d 867 (7th Cir. 2005) 4, 18

Badalamenti v. Dunham's, Inc., 896 F.2d 1359 (Fed. Cir. 1990) 11

Bernofsky v. Tulane University Medical School, 1996 WL 198118 (E.D. La. Apr. 22, 1996) 16

Charles O. Bradley Trust v. Zenith Capital LLC, 2005 WL 1030218 (N.D. Cal. May 3, 2005) 17

Emerson Elec. Co. v. Ouellette, 1998 WL 34088465 (D.N.H. May 12, 1998) 12

Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179 (E.D. Cal. 1991) 11

First Sav. Bank, F.S.B. v. First Bank Sys., Inc., 902 F.Supp. 1356 (D. Kan. 1995) 15

Heavin v. Owens-Corning Fiberglass, 2004 WL 316072 (D. Kan. Feb. 3, 2004) 16

Hickman v. Taylor, 329 U.S. 495 (1947) 19

Jackson v. County of Sacramento, 175 F.R.D. 653 (E.D. Cal. 1997) 12

Kontrick v. Ryan, 540 U.S. 443 (2004) 13

TABLE OF AUTHORITIES — Continued

Page

Mader v. Motorola Inc., 1994 WL 535125 (N.D. Ill. Sept. 30, 1994) 16

Public Service Co. v. Portland Natural Gas, 218 F.R.D. 36[illegible] (D.N.H. 2003) 15, 16

In re Richardson-Merrill, Inc. Bendectin Products Liab. Litig., 97 F.R.D. 481 (S.D. Ohio 1983) 11

S.G. Cowen Sec. Corp. v. United States Dist. Court, 189 F.3d 909 (9th Cir. 1999) 14

Stevens v. Omega Protein, Inc., 2002 WL 1022507 (E.D. La. May 16, 2002) 16

United States v. Gericare Medical Supply, Inc., 2000 WL 33156442 (S.D. Ala. Dec. 11, 2000) 12

United States v. Philip Morris Inc., 314 F.3d 612 (D.C. Cir. 2003) 14

United States v. Philip Morris Inc., 347 F.3d 951 (D.C. Cir. 2003) 4, 15

Upjohn Co. v. United States, 449 U.S. 383 (1981) 18

Rules:

Fed. R. Civ. P. 26(b)(5) ..... *passim*

Fed. R. Civ. P. 26(e) 6

Fed. R. Civ. P. 34 ..... *passim*

TABLE OF AUTHORITIES — Continued

Page

Fed. R. Civ. P. 34(b) 1, 10, 11

Fed. R. Civ. P. 37 16

Fed. R. Civ. P. 37(a) 15

Fed. R. Civ. P. 37(b) 15

Fed. R. Civ. P. 37(b)(2) 11

Miscellaneous:

J. Solovy & R. Byman, *Blanket Objections*, NAT'L L. J., June 6, 2005, at 12 14

8 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2016.1 (2d ed. 1994) 15

PETITION FOR A WRIT OF CERTIORARI

BNSF respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying its petition for a writ of mandamus.

OPINIONS BELOW

The opinion of the court of appeals, as amended on the denial of rehearing (App., *infra*, 1a-11a), is reported at 408 F.3d 1142. The order entered by the district court (App., *infra*, 16a-17a) and the magistrate's opinion (App., *infra*, 12a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2005. Petitioner filed a timely petition for rehearing and rehearing en banc on April 14, 2005. The court of appeals denied BNSF's rehearing petition on May 19, 2005 and, at the same time, made a number of changes to its opinion. App., *infra*, 18a-20a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 34(b) of the Federal Rules of Civil Procedure provides in relevant part as follows:

> The party upon whom the request [to produce documents] is served shall serve a written response within 30 days after the service of the request. . . . The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.

Rule 26(b)(5) provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

STATEMENT

Until the sea change wrought by the Ninth Circuit decision in this case, it was customary for practitioners throughout the country to respond to requests for production just as BNSF did here: by serving a timely Rule 34 response objecting to the requests to the extent that they sought production of documents protected by attorney-client and work product privileges and then, at some later date, providing the opposing party with a privilege log specifically describing the documents being withheld on privilege grounds. Often, as in this case, the time-consuming task of creating a privilege log for documents that are *not* being produced is postponed until after the documents that *are* being produced have been provided to the opposing party.

This customary approach comports with the Federal Rules and is a practical way of ensuring that the often cumbersome process of producing a privilege log does not create a roadblock to discovery. Under this approach, Rule 34 responses are provided in a timely fashion. Responsive, non-privileged documents are delivered to the requesting party promptly, without waiting for the laborious compilation of a privilege log. And the right of the responding party to claim appropriate privileges is fully protected.

There is nothing in the Federal Rules that would alert practitioners that this customary and sensible procedure could result in a wholesale waiver of their client's privileges. As the Ninth Circuit acknowledged, Rule 34 requires objections to be made within 30 days of a request for production but does not explain how detailed objections must be; Rule 26(b)(5) requires a privilege log to be provided but does not say *when* it must be provided; and neither the Advisory Committee Notes to the Federal Rules nor judicial decisions provide clear guidance on these issues. Nevertheless, the court concluded that, when Rule 34 and Rule 26(b)(5) are read together, they create a regime under which the only way a party can be sure that it has preserved its privilege objections is to provide a privilege log at the same time that it serves its Rule 34 response.

The Ninth Circuit arrived at this result through a two-part rationale. First, it concluded that simply objecting to requests to the extent that they seek production of privileged documents — making what the court characterized as "boilerplate objections" — is not enough to meet the requirements of Rule 34. The court concluded that, under Rule 26(b)(5), all privilege objections must be supported by a description of the documents being withheld that is sufficient to allow the opposing party and the court to judge the validity of the privilege assertion. Second, the court concluded that a failure to serve the privilege log within a "reasonable" period of time constitutes a waiver of the privilege — without any need for a finding of bad faith, lack of cooperation in the discovery process, or prejudice to the opposing party. The court rejected the "per se" waiver rule the magistrate had employed, under which a failure to provide a privilege log along with a Rule 34 response would automatically be deemed a waiver of all privileges. The court substituted instead a "holistic reasonableness" rule under which a court would decide, on a case-by-case basis and with the benefit of hindsight, whether a delay in providing a privilege

log should be deemed a waiver of the right to assert any privileges.

BNSF seeks certiorari because the Ninth Circuit's decision rewrites the Federal Rules, imposing requirements that cannot be found anywhere in the Rules and that are contrary to long-standing practice. In addition, the decision conflicts with the approach taken by the D.C. Circuit, as well as with the weight of authority in the district courts, which regards "waiver of a privilege [as] a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith." *United States v. Philip Morris Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (internal quotations omitted). The Ninth Circuit's decision, by contrast, sets a trap for unwary litigants (and their counsel), subjecting them to the draconian penalty of a wholesale privilege waiver simply because the court, in hindsight, believes that a privilege log could have been produced more expeditiously.

The question of when and how privileges must be asserted is of great importance to the administration of justice in the federal system. It is rare in modern civil litigation that discovery requests are *not* drafted broadly enough to include documents that are at least arguably privileged or protected from discovery by the work product doctrine. In light of the "vital role the privilege plays in the administration of justice," *American Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y*, 406 F.3d 867, 878 (7th Cir. 2005), it is critical that the rules governing the assertion of privileges be clear and that enforcement of those rules strike a proper balance between advancing discovery and protecting privileged communications. For the reasons outlined below, the Ninth Circuit's decision fails in both respects, leaving litigants without clear guidance and imposing a wholly disproportionate penalty for delaying the production of a privilege log without regard to whether that delay had any impact on the course of discovery.

A. Proceedings in the Trial Court.

This is a case brought by private landowners against BNSF seeking damages for alleged groundwater contamination from a nearby railyard. In the three years this case has been pending, plaintiffs have served fourteen sets of discovery requests on BNSF, asking it to produce dozens of different categories of documents created over the course of many decades. In every instance, BNSF has responded to plaintiffs' requests in a timely fashion, producing over 78,000 pages of documents.

When it served its Rule 34 response to plaintiffs' first request for documents in December 2002, BNSF lodged a general objection to plaintiffs' requests "to the extent that they purport to require BNSF to provide information that is protected from disclosure by the attorney-client privilege [or] the work-product doctrine." C.A. Exh. 7B at 1-2. In addition, BNSF made specific objections on privilege or work product grounds to six of plaintiffs' requests. For example, it objected to a request for all copies of "written notes, summaries, tapes, statements and/or interview transcripts you and/or your agent(s) have taken or obtained from any witness in this matter," on the ground that the request sought "materials protected by the attorney/work-product privilege." *Id.* at 4.

BNSF lodged multiple objections to some requests. Request No. 8, for example, asked for "any documents BNSF ever generated, maintained and/or received at any time . . . regarding the hazardous nature and/or toxicity of" certain chemicals used at the railyard. C.A. Exh. 7B at 7. BNSF objected to this request on the ground that it was overbroad and unduly burdensome, was not reasonably calculated to lead to the discovery of admissible evidence, and called for the production of privileged documents. *Id.* at 8. At the same time, BNSF noted that it would be producing specific categories of non-privileged documents responsive to this request. *Id.*

When BNSF responded to plaintiffs' first request for production, it had begun the laborious process of preparing a privilege log listing all of the documents it would be withholding from production on privilege or work product grounds. As is customary, BNSF did not attempt to postpone its Rule 34 response until it completed that log. Instead — just as plaintiffs themselves did when they later answered BNSF's discovery requests — BNSF served a response within the 30-day period called for by Rule 34, generally objected to producing privileged documents, and left both the production of documents and the transmission of a privilege log to a future date.

Four months later, on April 7, 2003, plaintiffs filed a motion to compel in which they argued that BNSF should be required to organize the large volume of documents it had already produced in a way that corresponded to the various categories in plaintiffs' requests. Plaintiffs also complained that BNSF had not yet provided a privilege log. Plaintiffs did not argue that BNSF had waived its right to assert any privileges. Instead, they simply asked the magistrate who was supervising discovery to order BNSF to provide a privilege log. *See* C.A. Exh. 5, attach. 2, at 7-8.

Three weeks later, before the magistrate ruled, BNSF gave plaintiffs a privilege log. Plaintiffs were apparently satisfied, because they made no further mention of the issue.

After plaintiffs received BNSF's first privilege log, they served multiple additional discovery requests. BNSF responded to each one in a timely manner, reiterating its objection to producing documents protected by the attorney-client privilege and work product doctrine. As additional documents were requested by plaintiffs and located by BNSF, BNSF revised and supplemented its privilege log, as required under Rule 26(e).

On January 21, 2004, plaintiffs filed a motion to compel production of all of the 1,023 documents identified on BNSF's privilege logs through January 9, 2004, arguing for the first time that BNSF had waived any claim of privilege or work product protection by not providing the log when it served its Rule 34 response more than a year earlier, on December 9, 2002. C.A. Exh. 4, at 6-8. Alternatively, plaintiffs argued that 393 of the documents were not properly characterized as attorney-client communications or work product. *Id.* at 8-18.

On March 15, 2004, the magistrate granted plaintiffs' motion to compel production of all of the documents listed on BNSF's logs. The magistrate rejected BNSF's argument that the general objections made in its Rule 34 response were sufficient to preserve its privilege objections. He held that Rule 26(b)(5) requires a privilege log to be served contemporaneously with Rule 34 responses and that the privilege is automatically waived if a timely log is not provided: "where the privilege objection is not correctly and timely made, it is deemed waived." App., *infra*, 14a.[1]

BNSF filed timely objections to the magistrate's decision in the district court, arguing that waiver ought to be reserved as a sanction for a deliberate failure to cooperate in discovery and should not be the automatic consequence of a delay in providing a privilege log. The district court summarily rejected BNSF's objections, holding that the magistrate had "properly applied the plain meaning of Rule 26(b)(5) to the facts of this case" and that his decision was therefore not clearly erroneous or contrary to law. App., *infra*, 17a.

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[1] The magistrate also rejected BNSF's argument that plaintiffs had forfeited any waiver claim they might have had by failing to assert it for a year after they received BNSF's Rule 34 discovery objections. App., *infra*, 13a.

BNSF obtained a stay of the magistrate's order and filed a mandamus petition in the Ninth Circuit. The Ninth Circuit granted full briefing and heard oral argument and then issued a published opinion that denied the petition, but provided guidance on what the panel acknowledged to be an important issue of first impression.

B. The Ninth Circuit's Opinion.

The Ninth Circuit noted that "[t]wo propositions are embedded in the [magistrate's] assertion" that BNSF had waived its privilege objections. App., *infra*, 5a. The first is that "a general, boilerplate assertion of an evidentiary privilege" in a Rule 34 response "does not satisfy the demands of Rule 26(b)(5) and Rule 34, when read together" and thus is not a "proper assertion of the privilege." *Id.* at 5a-6a. The second proposition is that the effect of untimeliness in properly asserting the privilege is that the privilege is deemed waived or otherwise abandoned. *Id.* at 6a. The Ninth Circuit concluded that the magistrate was right on the first proposition, but not necessarily on the second.

The court acknowledged that Rule 34 does not describe how a privilege objection must be made and "does not contain an explicit prohibition against boilerplate objections." App., *infra*, 6a. But the court read Rule 26(b)(5) as "clarif[ying]" Rule 34 and requiring that an objection be more specific than a "generalized, boilerplate objection." *Id.* The court noted that Rule 26(b)(5) does not "specifically correlate the requirement" that the responding party provide a description of the documents being withheld with the "bright-line rule for timeliness" in Rule 34 and that neither rule explicitly provides for a waiver. *Id.* It also observed that neither the Advisory Committee Notes, nor "[j]udicial construction of the rules . . . resolve[s] the issue." *Id.* at 7a-8a.

As the court explained, "[n]o Circuit has explicitly weighed in on the precise content of Rule 26(b)(5)'s notice requirement, nor on its relationship to Rule 34's deadline." App., *infra*, 8a. And district court decisions on the issue are a "very mixed bag, running the gamut from a permissive approach where Rule 26(b)(5) is construed liberally and blanket objections are accepted, to a strict approach where waiver results from failure to meet the requirements of a more demanding construction of Rule 26(b)(5) within Rule 34's 30-day limit." *Id.* The Ninth Circuit stated that "[i]n order to honor the spirit of the rules, we now chart a middle road," rejecting the "per se waiver rule" adopted by the magistrate in favor of a "case-by-case" determination. *Id.* at 9a. The court held that, in making that "case-by-case" determination, the judge overseeing discovery should employ a "holistic reasonableness analysis," considering

> the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy (such as, here, the fact that many of the same documents were the subject of discovery in an earlier action) or unusually hard.

Id. at 9a-10a.

Applying this new standard to the facts before it, the court concluded that the magistrate had not clearly erred in concluding that BNSF had waived its right to claim any

privilege. App., *infra*, 10a. The court characterized BNSF's objections as insufficient and stated that the five-month interval between its Rule 34 response and the service of a privilege log was enough, in the absence of mitigating circumstances, to support the lower court's ruling. Although the lower court had made no findings on the reasonableness of BNSF's conduct, the Ninth Circuit assumed that BNSF could have produced a log at an earlier point in time because it was a "repeat player" in litigation involving the site in question and held that its failure to do so could therefore be deemed a waiver. *Id.*

BNSF filed a timely petition for rehearing and rehearing en banc. The Ninth Circuit denied the petition, but amended its opinion to (among other things) explain that in the future litigants could avoid waiving privileges by seeking an extension of time, either by agreement or from the court, to provide a privilege log. App., *infra*, 18a-20a.

Before the mandamus petition was filed, the magistrate had entered a stay of his order compelling BNSF to produce the documents on its privilege log "pending further Order of the Court." That stay remains in effect. C.A. Exh. 3, at 2.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION EFFECTIVELY REWRITES THE FEDERAL RULES.

Rule 34 requires a litigant who has received a request for production of documents to respond to the request within 30 days by stating, with respect to each item requested, either that it will comply with the request or that it objects. If the responding party objects, Rule 34(b) requires it to state "the reasons for the objection." Rule 34(b) does *not* require the responding party to produce the requested documents contemporaneously with the service of the response. Furthermore, as the Ninth Circuit observed, Rule 34(b) "does

not contain an explicit prohibition against boilerplate objections or assertions of privilege." App., *infra*, 6a.

Prior to the adoption of Rule 26(b)(5) in 1993, there was a split of authority as to what a party was required to do in order to make an effective objection under Rule 34(b). Some courts held that general privilege objections were insufficient and that the responding party was required to provide a description of the documents being withheld at the time a Rule 34 response was provided. *See, e.g., Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 182 (E.D. Cal. 1991). Other courts, however, held that a general objection was sufficient so long as it was clear that responsive documents were being withheld on privilege grounds. *See, e.g., In re Richardson-Merrill, Inc. Bendectin Products Liab. Litig.*, 97 F.R.D. 481, 484 (S.D. Ohio 1983); *see also Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359, 1362 (Fed. Cir. 1990) (a general objection claiming that documents were confidential was sufficient to constitute a proper response under Rule 34).

Rule 26(b)(5) provided some clarification, but did not end the debate. That Rule provides that "[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly." The Advisory Committee Notes to this new provision explain that it was designed to ensure that a party gives notice to the other side if it is withholding documents on privilege grounds. The Notes explain that "[t]o withhold such materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection."

After requiring notice that documents are being withheld, Rule 26(b)(5) goes on to provide that the withholding party "shall describe the nature of the documents . . . not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the

applicability of the privilege or protection." Neither the Rule itself nor the Advisory Committee Notes explain *when* the required description of the documents must be provided. *See Jackson v. County of Sacramento,* 175 F.R.D. 653, 656 (E.D. Cal. 1997) (noting that the Rule is silent on the timing issue and therefore the "duty to provide the description required by Rule 26(b)(5) is flexible and does not arise until there is a good faith challenge to the privilege claim"); *Emerson Elec. Co. v. Ouellette,* 1998 WL 34088465 at *8 (D.N.H. May 12, 1998). Furthermore, the Advisory Committee Notes confirm that the Rule intentionally "does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection," leaving that determination to each individual case.

Significantly, there is nothing in the rules or commentary suggesting that a party must comply with all of the requirements of Rule 26(b)(5) when it serves a Rule 34 response. Indeed, the language of Rule 26(b)(5) appears to be directed to the point in time at which documents are produced — "[w]hen a party withholds information" — rather than to the (earlier) point in time when a party serves its Rule 34 response, making its objections and stating what it intends to produce. Moreover, the Advisory Committee Notes "mention waiver of the privilege or protection as a sanction only for failure to expressly assert the privilege, not for failure to produce a privilege log." *United States v. Gericare Medical Supply, Inc.,* 2000 WL 33156442 at *6 (S.D. Ala. Dec. 11, 2000).

Thus, the Rules themselves allow for flexibility, not only with respect to the nature of the information that must be provided, but also with respect to when a privilege log must be provided to the opposing party. Having flexibility with respect to timing makes sense because, particularly in document-intensive cases, Rule 34 responses are often filed before the responding party has had an opportunity to review all of the

responsive documents — let alone to generate a full-blown privilege log.

If no specific deadline is imposed for providing a privilege log, then the waiver calculus is fundamentally altered. If there were a clear and unequivocal deadline for providing a log, it would be reasonable to treat the failure to provide a log in a timely fashion (or to seek an extension of time) as an intentional relinquishment of the right to object to producing documents on privilege grounds. *See Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) ("waiver is the intentional relinquishment or abandonment of a known right") (internal quotations omitted). But in the absence of a clear deadline, the fact that there was a gap in time between the service of a Rule 34 response that included privilege objections and the provision of a log does not provide any basis for inferring an intent to waive the privilege — or for imposing a forfeiture for failing to timely assert a privilege.[2]

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE APPROACH TAKEN BY THE D.C. CIRCUIT AND THE WEIGHT OF AUTHORITY IN THE DISTRICT COURTS.

Although it rejected the "automatic waiver" rule adopted by the magistrate in this case, the Ninth Circuit itself adopted a presumptive waiver rule. Thus, the court held that general objections in a Rule 34 response are presumptively insufficient and that any significant delay in providing a privilege log would give rise to a waiver unless the party was able to persuade the

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[2] As the Court observed in *Kontrick*, "[a]lthough jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." 540 U.S. at 458 n.13 (internal quotations omitted).

trial court that a log could not have been prepared at an earlier point in time. The Ninth Circuit characterized this approach as "chart[ing] a middle road through the wide spectrum of caselaw regarding discovery." In fact, however, "[t]his decision is not middle of the road; it rides the right shoulder of a six-lane highway." J. Solovy & R. Byman, *Blanket Objections*, NAT'L L.J., June 6, 2005, at 12.

The Ninth Circuit's decision that waiver can result merely from delay in providing a privilege log is contrary to the approach taken by the D.C. Circuit and to the great weight of authority in the district courts. In *United States v. Philip Morris Inc.*, one of the defendants filed an interlocutory appeal from an order requiring it to produce a document that it claimed was privileged.[3] The trial court in that case had concluded that the privilege was waived because the document was not included on the defendant's privilege log. The D.C. Circuit reversed, directing the trial court to consider on remand whether the defendant's objections to the scope of the document requests (which, if granted, would make the document non-responsive) should be sustained. If those objections were overruled, the trial court was instructed to consider whether the defendant should be given the opportunity to add the document to its privilege log or whether the failure to do so previously should be deemed a waiver. The D.C. Circuit explained that "[w]aiver

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[3] The D.C. Circuit allows interlocutory appeals from orders that compel the production of arguably privileged documents under the collateral order doctrine. *See United States v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003). The Ninth Circuit, on the other hand, has concluded that "discovery orders are not final, appealable orders under 28 U.S.C. § 1291." *S.G. Cowen Sec. Corp. v. United States Dist. Court*, 189 F.3d 909, 913 (9th Cir. 1999). Thus, mandamus was the only avenue available to BNSF to seek appellate review of the district court's order.

is not automatic," noting that "[a]s the federal rules, case law and commentators suggest, waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith." 347 F.3d at 954, quoting *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 902 F.Supp. 1356, 1361 (D. Kan. 1995). The court also cited with approval 8 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2016.1 at 234-35, which explains that "[u]nless there has been a bad-faith failure to comply with a reasonable identification effort, automatically finding a waiver of the privilege would be unduly harsh."

In case after case district courts have refused to deem privileges waived even when they have concluded that a privilege log was not provided in a timely manner. For example, in *Public Service Co. v. Portland Natural Gas*, 218 F.R.D. 361 (D.N.H. 2003), the court reversed a magistrate's order compelling the production of privileged documents on the ground that a failure to provide a privilege log along with the discovery response waived the privilege. The court accepted the magistrate's determination that the party's failure to provide a privilege log along with its discovery response violated Rule 26(b)(5). But the court rejected the magistrate's ruling that waiver was automatic, holding that "[a] failure to comply with Rule 26(b)(5) . . . should be enforced under Rule 37." 218 F.R.D. at 364. The court noted that under Rule 37(a) "most failures to comply with discovery obligations initially expose a recalcitrant party only to an order compelling it to comply and requiring it to pay the requesting party's associated costs and legal fees." Citing Rule 37(b), the court went on to observe that "[h]arsher sanctions . . . come into play only if a party fails to obey a court order compelling a response." *Id.* at 363. Applying these principles to the imposition of sanctions for violating Rule 26(b)(5), the court concluded that it would be "unnecessarily harsh" to make a waiver finding "when the responding party invokes a privilege but initially fails to produce a privilege log

with its discovery responses." *Id.* The court then went on to hold that "an award of attorneys' fees and costs ordinarily will be a sufficient sanction if" — as BNSF did here — "the requesting party invokes a privilege and produces its privilege log late, but before it is ordered to do so." *Id.* at 364.

Other cases reach the same result. In *Heavin v. Owens-Corning Fiberglass*, 2004 WL 316072 (D. Kan. Feb. 3, 2004), the court found that the defendant was late in providing a privilege log and that the log it provided was inadequate; nevertheless, the court refused to conclude that the defendant had waived any protection for the documents in question. Instead, the court simply ordered the defendant to submit a more detailed log. Similarly, in *Stevens v. Omega Protein, Inc.*, 2002 WL 1022507 at *3 (E.D. La. May 16, 2002), the court declined to impose the "draconian remedy of waiver" for failure to provide a privilege log, instead "requir[ing] plaintiff to do what he should already have done, i.e., provide the log required by Rule 26(b)(5)." The court stated that failure to provide the log in compliance with the court's order would result in a waiver of plaintiffs' privilege objections. *Accord Bernofsky v. Tulane Univ. Med. Sch.*, 1996 WL 198118 at *2 (E.D. La. Apr. 22, 1996) (requiring defendant to provide a privilege log and stating that failure to do so would result in a waiver of the privilege); *Mader v. Motorola Inc.*, 1994 WL 535125 at *10 (N.D. Ill. Sept. 30, 1994) (finding plaintiffs' motion to compel premature where defendant had not yet provided a privilege log and ordering defendant to do so).

Under the rationale of these cases, an inadequate assertion of a privilege does not lead to either an automatic or a presumptive waiver of the privilege. Instead, it should be treated like any other failure to fully comply with discovery obligations: the court should first consider the proper remedy to enforce compliance (ordinarily ordering production of a privilege log) and then consider whether the party's conduct was so egregious

that it warrants the imposition of a sanction under Rule 37. Even if a sanction is deemed appropriate, however, the "draconian remedy of waiver" should be reserved for cases of bad faith, refusal to comply with court orders, and demonstrated prejudice to the opposing party. Contrary to the Ninth Circuit's decision, waiver is never an appropriate sanction merely for a delay in providing a privilege log — particularly when, as in this case, the log is ultimately provided without any need for judicial intervention.

III. THE NINTH CIRCUIT'S NEW RULE UPENDS DECADES OF ESTABLISHED DISCOVERY PRACTICE AND OPENS A PANDORA'S BOX OF CONFUSION LEADING TO DELAY AND INADVERTENT PRIVILEGE WAIVER

If it is not reversed by this Court, the Ninth Circuit's rewrite of Rules 26 and 34 will profoundly impact the day-to-day functioning of document discovery, particularly in complex civil litigation. Practitioners in the federal courts who followed the long-standing practice of supplying a privilege log after documents have been produced may find that they have inadvertently waived all of their client's privileges. That the Ninth Circuit applied its newly-announced rule retroactively to BNSF will encourage a cottage industry in waiver claims as discovery gamesmanship trumps efficiency. Indeed, the ink was barely dry on the Ninth Circuit opinion before parties starting crying "waiver!" as a result of their opponent's failure to serve a privilege log with an initial Rule 34 response. See *Charles O. Bradley Trust v. Zenith Capital LLC*, 2005 WL 1030218 at *2 (N.D. Cal. May 3, 2005).

Even if, in the future, practitioners are fully aware of the Ninth Circuit's decision, they will find little guidance or protection in the court's "holistic reasonableness" rule. In fact, the Ninth Circuit's "rule" is really no rule at all. Instead, it is an open invitation to Monday morning quarterbacking — often by

magistrates who are weary of complicated privilege debates and may be tempted to avoid *in camera* examination of large numbers of documents by the simple expedient of declaring all privileges waived because the privilege log was untimely. *Cf. American Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y*, 406 F.3d 867, 878-80 (7th Cir. 2005).

In denying BNSF's petition for rehearing, the Ninth Circuit suggested that the uncertainties created by its new rule could be avoided in the future by obtaining an extension of time in which to submit a privilege log. But that suggestion illustrates how the Ninth Circuit's new rule will create a discovery environment of delay and deferral. Parties who cannot produce a complete privilege log within 30 days — which is to say every defendant in complex civil litigation — now must move the trial court for an extension of time for their Rule 34 response. Furthermore, the Ninth Circuit's approach will necessarily slow the production of unprivileged documents by making the creation of the privilege log — rather than the expeditious production of documents — the priority. Neither Rule 34 requesters nor responders will benefit from such an upside-down result.

The Ninth Circuit's view that waiver results merely from "unreasonable" delay in providing a complete privilege log also bodes ill for litigants and their counsel who fail to find a privileged document when the first round of document review is conducted. Adding a new document to a privilege log would inevitably raise the question whether, in retrospect, the document could have been identified earlier and whether the failure to do so should therefore be deemed a waiver. To impose such a draconian sanction on a party for such routine oversights would serve to encourage the very "gamesmanship" the Ninth Circuit sought to avoid.

Privileges are too important to be treated so lightly. In *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), this

Court explained that the attorney-client privilege serves a vital function in our legal system:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. [Citation omitted.] Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Similarly, in *Hickman v. Taylor*, 329 U.S. 495, 516 (1947), Justice Jackson explained the importance of shielding attorney work product from discovery:

> [A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary. . . . I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him.

Given the broad scope of today's customary discovery requests, it is inevitable that privilege issues will arise in virtually every case. Thus, it is critical that the rules for withholding documents on privilege and work product grounds be both clear and appropriately balanced between efficiency and protection of the vital interests served by the privilege and work product doctrine. The Ninth Circuit's decision in this case does not achieve either result. On the contrary, it serves only to increase the confusion surrounding the assertion of privileges and to heighten the risk that important privileges will be inadvertently waived.

This Court should grant certiorari to resolve that confusion and to decide (i) what steps a litigant must take in order to properly assert privilege and work product objections in response to discovery requests and (ii) under what circumstances privileges may be forfeited by a failure to comply with those requirements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LEO BERRY
OLIVER H. GOE
CHAD E. ADAMS
Browning, Kaleczyc, Berry & Hoven, P.C.
139 North Last Chance Gulch
P.O. Box 1697
Helena, MT 59624
(406) 443-6820

JOHN C. BERGHOFF, JR.
MICHELE ODORIZZI
Counsel of Record
MICHAEL P. RISSMAN
Mayer, Brown, Rowe & Maw LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Petitioner

AUGUST 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-72134

BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA,
Respondent,

BRIAN KAPSNER AND RYANN KAPSNER,
Real Parties in Interest.

Argued and Submitted January 12, 2005
March 31, 2005, Filed
May 19, 2005, Amended

Appeal from the United States District Court
for the District of Montana (Billings).
No. CV-02-00116-RFC.
Richard F. Cebull, District Judge, Presiding.

Before: Hon. Mary M. Schroeder, Chief Judge, and
Hon. Alfred T. Goodwin and
Hon. Susan P. Graber, Circuit Judges.

Opinion: Amended Opinion

GOODWIN, Circuit Judge:

Burlington Northern & Santa Fe Railway Company ("Burlington") petitions this court for a writ of mandamus to overturn the District Court of Montana's discovery ruling, which orders Burlington to produce documents to plaintiffs Brian and Ryann Kapsner ("the Kapsners") in underlying environmental litigation in which Burlington is the defendant. The writ is denied.

I. FACTS AND PROCEDURAL HISTORY

The Kapsners brought an action on July 12, 2002, against Burlington in the District Court of Montana for the Sixth Judicial District (Park County) for Burlington's alleged intentional dumping of diesel oil and toxic solvents, resulting in contamination of the Kapsners' land, and for Burlington's intentional failure to contain and remediate this damage. Burlington removed to the United States District Court for the District of Montana on diversity grounds. The amended complaint seeks recovery for nuisance, negligence, strict liability, trespass, wrongful occupation, violations of the Montana Constitution, unjust enrichment, and misconduct warranting punitive damages.

Discovery has been underway since November 6, 2002, when the Kapsners served their first set of document requests pursuant to Federal Rule of Civil Procedure 34 ("Rule 34"). The discovery process has been characterized by delay, misunderstandings, and increasing acrimony between the parties. Burlington responded to the Kapsners' first set of document requests on December 9, 2002. However, this response was not accompanied by a privilege log. The record suggests that both parties intended and expected from the outset that a privilege log would in fact be produced. Thus, while Burlington accuses the Kapsners of gamesmanship in

failing to assert the argument that the privilege was waived in their original motion to compel, Burlington does not seriously dispute that a privilege log was expected.

The Kapsners objected to the form of Burlington's original response, which was not accompanied by documents but recited an invitation to inspect documents on Burlington premises. The Kapsners complained to Burlington as early as January 2003 that the production was neither organized according to the categories in the discovery requests nor kept in "the usual course of business," as required by Rule 34, and instead was simply produced in boxes "with no rhyme or reason." Underlying these disagreements about form was the Kapsners' belief that responsive documents were being improperly withheld. On April 7, 2003, the Kapsners filed a motion to compel, arguing that in addition to producing documents in an impermissible form, Burlington was withholding responsive documents, and had made no assurance that its production exhausted the universe of responsive documents.

Before the magistrate judge ruled on the motion, Burlington produced a privilege log. The Kapsners continued to suspect that Burlington was withholding unprivileged responsive documents, and were apparently unsatisfied with this log, which they allege "made it difficult . . . to determine whether [Burlington] was complying with its discovery obligations or asserting its privileges in good faith." The magistrate judge ordered Burlington to organize its entire production to correspond to discovery requests, and to produce documents responsive to the Kapsners' requests as stated rather than as unilaterally limited by Burlington.

The parties continued to wrangle over the privilege issue during the next fourteen months, as the Kapsners issued additional discovery requests insisting that responsive documents continued to be withheld. During this time, Burlington modified its privilege log several times, removing

entirely some documents that were previously marked as responsive but privileged. In a letter to Burlington, the Kapsners again articulated their position the unprivileged responsive documents were being withheld, demanded voluntary production, and declared their intention to file another motion to compel if the documents were not produced. After Burlington refused to produce the contested documents, the Kapsners filed a second motion to compel, this time demanding all responsive documents withheld from production on privilege grounds. The magistrate judge granted the motion, and upon appeal to the district judge, his order was upheld.[1] Burlington then brought this petition for a writ of mandamus to overturn the district court's order.

II. DISCUSSION

Standard of Review

The writ of mandamus is an "extraordinary" remedy limited to "extraordinary" causes. *Cheney v. U.S. Dist. Court*, 124 S. Ct. 2576, 2586 (2004). In order to gain the benefit of the writ, the party must have no other recourse; the right to the writ must be "clear and indisputable"; and the appellate court must be satisfied that the writ is appropriate under the circumstances. *Id.* at 2587. Distilling the Court's mandamus caselaw, the Ninth Circuit has articulated this standard in terms of a five-factor test, asking whether: 1) there are no other adequate means, such as direct appeal, to secure relief; 2) failure to grant the writ would result in damage to petitioner that is "not correctable on appeal"; 3) the district court's order is "clearly erroneous as a matter of law"; 4) the order represents an "oft-repeated" error or patent "disregard of the federal rules"; and 5) the order raises "new and important problems" or legal issues of first impression.

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[1] Throughout the rest of this opinion, we refer to both the actions of the magistrate judge and the actions of the district court judge as actions of "the district court."

Bauman v. U.S. Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977); *see also Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1489-91 (9th Cir. 1989) (applying the *Bauman* factors). Not every factor need be present at once; indeed, the fourth and fifth will rarely be present at the same time. *Id.* at 1491. However, the absence of the third factor, clear error, is dispositive. *See, e.g., Gallo v. U.S. Dist. Court*, 349 F.3d 1169, 1177 (9th Cir. 2003), *cert. denied*, 541 U.S. 1073 (2004).

Thus, we review the district court's order for clear error as a matter of law. In the present case, this standard is informed by the general principle, not unique to the mandamus context, that "district courts have wide latitude in controlling discovery." *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002) (internal quotation marks omitted). Because we hold that there was no clear error, we do not reach the remaining *Bauman* factors.

Proper Assertion of Privilege

Burlington argues that the district court erred as a matter of law by reading into Federal Rule of Civil Procedure 26(b)(5) ("Rule 26(b)(5)") and Rule 34 a *per se* rule that failure to produce a privilege log in a timely manner triggers waiver of privileges. While we reject the *per se* waiver rule, we affirm the district court's order on the ground that the factual circumstances put the result well outside the realm of clear error.

The district court agreed with the Kapsners that "defendant waived its privilege objections by failing to provide a privilege log at the time it served its discovery responses." Two propositions are embedded in the district court's assertion, when read in the context of the decision as a whole: (1) that a general, boilerplate assertion of an evidentiary privilege in response to a discovery request does

not satisfy the demands of Rule 26(b)(5) and Rule 34, read together, and is not a proper assertion of the privilege; and (2) that the effect of untimeliness in properly asserting the privilege is to waive or otherwise abandon the privilege.

Neither the text of the rules nor a binding judicial authority clearly affirms or negates these two propositions. Rule 34 requires that a written response to a discovery request be served within 30 days of the service of the request. The response must provide access to the information requested, either by permitting inspection or by producing documents, "unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts." Rule 34(b). While this Rule imposes a bright-line rule defining timeliness, it does not contain an explicit prohibition against boilerplate objections or assertions of privilege. Rule 26 provides, under the heading "Claims of Privilege or Protection of Trial Preparation Materials:"

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Rule 26(b)(5). Thus Rule 26 clarifies that a proper assertion of privilege must be more specific than a generalized, boilerplate objection. However, it does not specifically correlate this requirement with Rule 34's bright-line rule for timeliness, nor does it explicitly articulate a waiver rule.

The advisory committee notes accompanying the addition of the relevant paragraph to Rule 26(b)(5) do suggest a temporal framework for asserting privilege, and also suggest waiver as a possible result of failure to properly provide 26(b)(5) notice. "To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection." Rule 26(b)(5) advisory committee's note (1993 Amendments). However, the nature of this notice is explicitly left indeterminate. "The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection." *Id.* The notes also provide that, while details may be appropriate under some circumstances, there are circumstances in which they would be unduly burdensome. *Id.* Still, the "party must . . . provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection." *Id.* The absence of explicit guidance as to the nature of the required notice enlarges the vacuum in which strategic manipulation of the discovery process by means of blanket assertions of privilege, or "functionally silent" privilege claims, may flourish. *See generally* Rebecca A. Cochran, *Evaluating Federal Rule of Civil Procedure 26(b)(5) as a Response to Silent and Functionally Silent Privilege Claims,* 13 REV. LITIG. 219 (1994).[2]

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[2] Professor Cochran notes that functionally silent privilege claims are a systemic problem in large civil cases, where the

> privilege problems . . . more frequently arise from blanket or generalized privilege claims . . . Blanket claims appear to be express, but reveal so little about the basis for withholding the materials that they are 'functionally silent.' The problem of blanket, functionally silent privilege claims caused one civil litigator to advise other litigators to demonstrate good faith in the discovery process by voluntarily providing

Judicial construction of the rules does not resolve the issue. No Circuit has explicitly weighed in on the precise content of Rule 26(b)(5)'s notice requirement, nor on its relationship to Rule 34's deadline. This circuit has held that a privilege log is *sufficient* to properly assert the privilege, without explicitly holding that it is *necessary* to meet those requirements. *Dole v. Milonas*, 889 F.2d 885, 890 (9th Cir. 1989); *see also In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (citing *Dole*). However, in articulating this holding, the court did not authorize general boilerplate objections as a proper method of asserting the privilege; indeed, it named a variety of methods such as *in camera* review and redactions of privileged material, all of which involve conveying some information about the content of the allegedly privileged material, which a boilerplate objection does not do. *Dole*, 889 F.2d at 890. Moreover, at least one circuit has refused to issue a writ of mandamus to a trial court, where the latter had ruled that untimeliness had destroyed the attorney-client privilege, even though "it does not seem seriously disputed that the privilege would have attached if the objection had been timely and adequately asserted." *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1985) (per curiam). A survey of district court discovery rulings reveals a very mixed bag, running the gamut from a permissive approach where Rule 26(b)(5) is construed liberally and blanket objections are accepted, to a strict approach where waiver results from failure to meet the requirements of a more demanding construction of Rule 26(b)(5) within Rule 34's 30-day limit. In general, a strict *per se* waiver rule and a permissive toleration of boilerplate assertions of privilege both represent minority ends of the spectrum.

> detailed privilege logs and inviting in camera submissions even when not required by the court.

13 REV. LITIG. at 229 (footnote omitted).

While courts may differ in their chosen means, the end is clear. "Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems." Rule 26(f) advisory committee's note (1983 Amendment). Much ink has been spilled on the costs of abuse of the discovery process, and we will not rehearse those costs again here. "The purpose of discovery is to provide a mechanism for making relevant information available to the litigants . . . Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues . . ." *Id.* (citation omitted). In order to honor the spirit of the rules, we now chart a middle road through the wide spectrum of caselaw regulating discovery by reading Rules 26(b)(5) and 34 together, informed by the purposes of Rules 26(b)(5) as articulated in the advisory committee notes.

We hold that boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege. However, we also reject a *per se* waiver rule that deems a privilege waived if a privilege log is not produced within Rule 34's 30-day time limit. Instead, using the 30-day period as a default guideline, a district court should make a case-by-case determination, taking into account the following factors: the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy (such as, here, the fact that many of the same documents

were the subject of discovery in an earlier action) or unusually hard. These factors should be applied in the context of a holistic reasonableness analysis, intended to forestall needless waste of time and resources, as well as tactical manipulation of the rules and the discovery process. They should not be applied as a mechanistic determination of whether the information is provided in a particular format. Finally, the application of these factors shall be subject to any applicable local rules, agreements or stipulations among the litigants, and discovery or protective orders.[3]

Here, the district court found a waiver where the log not only was not filed during the Rule 34 time limit, but was filed *five months* later. In the absence of mitigating considerations, this fact alone would immunize the district court's ruling from reversal under the standard just articulated. But additional circumstances support the district court's ruling. Burlington is a sophisticated corporate litigant and a repeat player in environmental lawsuits and regulatory action involving the site that is the subject of the underlying lawsuit. The claim that responding in a timely fashion would have been impossible or overly burdensome is hard to justify, especially because the record reveals agreement between the parties that many of the same documents were previously produced in a prior lawsuit. The record also contains evidence that even the untimely assertion of privileges by

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[3] We are well aware that, particularly in discovery-intensive litigation, compiling a privilege log within 30 days may be exceedingly difficult, even for counsel who are sophisticated, experienced, well-funded, and acting in good faith. Further, we are aware (and take this opportunity to make district courts aware) that litigants seeking discovery may attempt to abuse the rule we announce today by propounding exhaustive and simultaneous discovery requests. In these circumstances, litigants are not without recourse. Rather, at the outset of discovery or, at the latest, before Rule 34's 30-day time limit has expired, they may either secure an appropriate agreement or stipulation from the relevant litigants or, failing that, apply for a discovery or protective order.

Burlington was insufficient. The district court noted that the untimely logs "failed to correlate [specified] documents with specific discovery requests." Moreover, the Kapsners represented, and Burlington admitted, that even after producing the privilege log, Burlington made substantive changes to that log, removing "documents which, upon additional review, were not responsive." While an appellate court is not in a position, given the absence of explicit fact-finding on this matter, to definitively resolve the reciprocal claims of gamesmanship advanced by both parties, this is precisely the type of evaluation that is entrusted to the district court.

III. CONCLUSION

The district court did not err in ordering Burlington to produce documents as to which it had untimely asserted a privilege. Because the district court's order is not clearly erroneous, there is no need to reach the remaining *Bauman* factors. Burlington's petition for a writ of mandamus is

DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BRIAN KAPSNER and RYANN KAPSNER,
Plaintiffs,

vs.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, a foreign Corporation, f/k/a BURLINGTON NORTHERN, INC., and BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation,
Defendant.

No. CV 02-116-BLG-RWA

[Filed March 15, 2004]

ORDER

Alleging that defendant untimely and improperly withheld documents on the basis of privilege, plaintiffs move to compel. Defendant objects, contending, among other things, that the motion is untimely. Because the motion was made within the motions deadline, the Court finds that argument to be without merit.

Plaintiffs have served 10 sets of discovery requests. They served their first set on November 6, 2002. Defendant responded on December 9, 2002, prefacing the response with

a generalized privilege objection. It also interposed attorney-client and work-product objections in some of its responses. It did not, however, serve plaintiffs with a privilege log until April 30, 2003. It revised and supplemented the log three times, on November 10, 2003, December 16, 2003, and January 9, 2004. Although the logs identified withheld documents, they failed to correlate those documents with specific discovery requests.

Plaintiffs claim that defendant waived its privilege objections by failing to provide a privilege log at the time it served its discovery responses. The Court agrees.

The question is governed by Rule 26(b)(5), Fed.R.Civ.P., which provides:

> *When* a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, *the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed* in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(Emphasis added.)

Defendant contends that this rule does not require that the privilege log be served simultaneously with discovery responses. Defendant's argument is contrary to the plain language of the rule, which requires that "when" a party asserts a privilege it "shall make the claim expressly *and* shall describe the nature of the documents, communications, or things not produced or disclosed . . . ." *Id.* (emphasis added). To obtain the protection of the privilege, the withheld information must be described at the time the privilege is asserted.

In order to properly assert a claim of privilege in accordance with Rule 26(b)(5), a party must identify the applicable privilege and, at the same time, describe the materials withheld. One without the other is not enough.

The description often results in the completion of a privilege log. However, the fact that a log may take time to complete does not mean that the assertion of the privilege without the log is sufficient. Unless an extension is applied for and received, the log must accompany the responses in order for the objection to be properly interposed.[1]

Defendant contends that it properly amended its privilege logs in response to plaintiffs' additional discovery requests. Defendant does not, however, claim that the new logs were timely served contemporaneously with its responses to the second through tenth sets of discovery.

Defendant cannot justify its failure to timely describe privileged materials by pointing to its non-particularized boilerplate objections preceding the discovery responses. Each response to a discovery request must be full and complete in and of itself. Generalized objections prefacing any responses to individual requests are distracting and meaningless and will not be considered by the Court.

This Court respects and protects attorney-client communications in every case where the privilege is properly asserted. However, where the privilege is not correctly and timely made, it is deemed waived. Defendant here failed to interpose proper, complete, timely, and responsive attorney-client and work-product privileges. It accordingly waived those privileges.[2]

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[1] Defendant here at no time asked the Court to grant additional time either in objecting or responding to the discovery requests or in preparing its privilege logs.

[2] Plaintiffs raise several substantive issues concerning the propriety of defendant's attorney-client and work-product objections, such as whether

Therefore, **IT IS ORDERED** that plaintiffs' motion to compel (docket no. 73) is granted. Defendant shall, within *20 days*, serve plaintiff with the documents identified in its privilege logs.

IT IS FURTHER ORDERED that plaintiffs' request for attorney fees and costs is granted. Within *10 days*, plaintiffs shall serve and file their affidavit of fees and costs incurred in filing this motion. Within *10 days* thereafter, defendant shall file its objections, if any, to the reasonableness of the fees and costs claimed. The matter will then be deemed submitted, unless otherwise ordered by the Court.

The Clerk of Court shall forward copies of this order to counsel of record.

Done and dated this 15th day of March, 2004.

/s/ Richard W. Anderson
RICHARD W. ANDERSON
UNITED STATES MAGISTRATE JUDGE

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communications with experts are protected and whether certain information was prepared in anticipation of litigation. Due to defendant's absolute waiver of the privileges, the Court need not address these issues.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BRIAN KAPSNER and RYANN KAPSNER,
Plaintiffs,

vs.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, a foreign corporation, f/k/a BURLINGTON NORTHERN, INC., and BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation,
Defendants.

CV-02-116-BLG-RFC

[Filed April 8, 2004]

ORDER

On March 15, 2004, United States Magistrate Judge Richard W. Anderson entered an Order granting Plaintiffs' motions to compel and directing Defendant to serve Plaintiffs with the documents identified in its privilege logs within 20 days. Magistrate Judge Anderson's Order also granted Plaintiffs' request for attorney fees and costs. Defendant filed objections to the Order on March 29, 2004.

This Court's review of Magistrate Judge Anderson's Order is not de novo, pursuant to 28 U.S.C. § 636(b)(1)(B), but, rather is "clearly erroneous and/or contrary to law"

pursuant to 28 U.S.C. § 636(b)(1)(A). Section 636(b)(1)(A) authorizes a magistrate to rule directly on non-dispositive pretrial motions, such as discovery motions. The standard of review for such motions is the "clearly erroneous" standard. Defendant argues the March 15, 2004 Order meets this standard of review and should be reversed.

In Magistrate Judge Anderson's Order, he held Defendant waived its privilege objections by failing to provide a privilege log at the time it served its discovery responses. Magistrate Judge Anderson examined Federal Rule of Civil Procedure 26(b)(5) and concluded Defendant must have identified the applicable privilege simultaneously with describing the materials withheld. Defendant failed to properly and timely assert applicable privileges in this case, and Magistrate Judge Anderson ruled, as a result, Defendant waived those privileges.

Magistrate Judge Anderson thoroughly addressed each issue in the March 15, 2004 Order, and he properly applied the plain meaning of Rule 26(b)(5) to the facts of this case. Accordingly, the "clearly erroneous and/or contrary to law" standard of § 636(b)(1)(A) has not been satisfied, and Magistrate Judge Anderson's March 15, 2004 Order shall not be overturned by this Court.

IT IS SO ORDERED.

The Clerk of Court shall notify the parties of the making of this Order.

Dated the 8th day of April 2004.

/s/ Richard F. Cebull
RICHARD F. CEBULL
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-72134

BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA,
Respondent,

BRIAN KAPSNER AND RYANN KAPSNER,
Real Parties in Interest.

Appeal from the United States District Court
for the District of Montana (Billings).
No. CV-02-00116-RFC.
Richard F. Cebull, District Judge, Presiding.

Argued and Submitted January 12, 2005,
Seattle, Washington

Filed March 31, 2005
Amended May 19, 2005

Before:
Hon. Mary M. Schroeder, Chief Judge,
Hon. Alfred T. Goodwin and
Hon. Susan P. Graber, Circuit Judges.

ORDER

The opinion filed March 31, 2005, slip op. 3893, and appearing at 403 F.3d 1042 (9th Cir. 2005), is amended as follows:

At 403 F.3d 1047 (slip op. 3903, 3rd line from the bottom of the page), delete the text after ". . . the following factors:" to just before "(where providing particulars . . ." and replace with the following:

> . . . the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged . . .

At 403 F.3d 1047 (slip op. 3904, at the end of the first continuation paragraph), after the word "format.", add the following:

> Finally, the application of these factors shall be subject to any applicable local rules, agreements or stipulations among the litigants, and discovery or protective orders.[1]

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[1] We are well aware that, particularly in discovery-intensive litigation, compiling a privilege log within 30 days may be exceedingly difficult, even for counsel who are sophisticated, experienced, well-funded, and acting in good faith. Further, we are aware (and take this opportunity to make district courts aware) that litigants seeking discovery may attempt to abuse the rule we announce today by propounding exhaustive and simultaneous discovery requests. In these circumstances, litigants are not without recourse. Rather, at the outset of discovery or, at the latest, before Rule 34's 30-day time limit has expired, they may either secure an

With these amendments, the panel has voted unanimously to deny the petition for rehearing. Chief Judge Schroeder and Judge Graber have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

No further petitions for rehearing or rehearing en banc shall be entertained.

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appropriate agreement or stipulation from the relevant litigants or, failing that, apply for a discovery or protective order.